No. 86-180

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

RYAN KREBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct in finding that under the circumstances of this case petitioner knowingly and intelligently waived his Sixth Amendment right to conflict-free counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 788 F.2d 1166.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1986. A petition for rehearing was denied on June 6, 1986 (Pet. App. 24a). The petition for a writ of certiorari was filed on August 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment.[1]

[1] In addition to petitioner, the indictment charged 28 other individuals with various drug offenses, in violation of 21 U.S.C. 841

1. At trial, the government established that petitioner, a licensed medical doctor, was a member of a large-scale drug trafficking operation headed by Nellie Bell Kassim (Pet. App. 1a-2a). Kassim operated a succession of medical clinics that purported to specialize in the treatment of obesity, but in fact engaged in illegal activities, including the sale of prescriptions and drugs obtained through false prescriptions (*ibid.*).

Following his indictment, petitioner retained Kenneth Robinson to serve as his defense counsel (Pet. App. 3a). Before trial, the government submitted a memorandum on actual or potential conflicts of interest in which it maintained that Robinson might have conflicts of interest in connection with the case. The government noted that because Robinson had represented Kassim during the conspiracy and for a brief period after the indictment, he might have received confidential information from her. In addition, the government informed the court that Robinson had successfully represented Kassim's sister, Nancy McInnis, on drug charges involving events that were alleged as an overt act in the conspiracy charges in this case. *Ibid.*

By affidavit, Robinson responded to the government's memorandum by stating that there was no real or potential conflict of interest, because neither petitioner nor Kassim had ever admitted guilt or implicated the other (Pet. App. 4a). Petitioner also filed an affidavit in which he stated that he was " 'waiv[ing] any conceivable—actual or potential—conflict' " that could arise from Robinson's prior representation of Kassim and McInnis (*ibid.*).

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and 846. Thirteen of the defendants pleaded guilty, and four were convicted after trial. Charges against six of the defendants were dismissed, and five were acquitted.

At a pretrial hearing on the conflict issue, held on June 24, 1982, Robinson informed the court that he had discussed the potential conflict of interest question with Kassim and petitioner, and Robinson restated his view that there was no conflict (1 Tr. 27; Pet. App. 4a). The government reiterated its view that a conflict was possible based on Robinson's prior representation of Kassim and McInnis (*ibid.*). The government noted, in particular, that Robinson's loyalties might still lie with Kassim and McInnis and that, as a result, Robinson's cross-examination of either at trial might be adversely affected (*ibid.*). In a lengthy exchange with petitioner, the court then ensured that petitioner had heard everything that had been said, advised petitioner of his Sixth Amendment right to be represented by conflict-free counsel, and explained that it was not possible to predict all possible conflicts that might arise at trial (1 Tr. 31-33; Pet. App. 4a-6a). Petitioner responded that he understood, but that he wished nonetheless to retain Robinson, and that he would waive any ineffective representation claim for purposes of appeal (*ibid.*).

On September 8, 1982, the government, pursuant to court order, released Jencks Act (18 U.S.C. 3500) material to the defendants. The Jencks Act material revealed, inter alia, that Kassim had agreed in late July 1982 to plead guilty and to testify for the government at the trial (Pet. App. 6a-7a, 12a). The material further revealed that Kassim might implicate Robinson in certain illegal activities related to the charges in this case (*ibid.*). On September 16, 1982, the day before trial began, one of petitioner's co-defendants moved to sever his trial from petitioner's on the grounds that the government had not timely disclosed that Kassim would testify and that the Jencks Act material established that Robinson had an actual conflict of interest due to Kassim's allegations against him (*id.* at 7a). At the hearing on the severance motion,

Robinson advised the court, in petitioner's presence, that he had explained to petitioner that Kassim might accuse Robinson at trial of suborning perjury and drug dealing, and that petitioner was willing to waive any claims based on that possibility (*id.* at 7a, 12a-13a). Petitioner remained silent during Robinson's statement of petitioner's position on the matter (*id.* at 7a). The court denied the severance motion (*ibid.*).

2. Petitioner's defense at trial was that he was unaware that Kassim's clinics were not legitimate businesses (Pet. App. 8a). During his opening statement, Robinson described Kassim as a "con" and a "flim flam artist," and focused on her ability to manipulate people, including petitioner (6 Tr. 20-21, 26-37, 41; Pet. App. 8a). Robinson described his representation of McInnis during the earlier trial, and his prior representation of Kassim, and he contended that he had been misled by her (6 Tr. 36-37; Pet. App. 8a). He stressed in particular his intention to rebut Kassim's expected accusation that he had suborned perjury at the McInnis trial (*ibid.*).

Although the government never alluded to Robinson's alleged unlawful activities during either its opening statement or its direct examination of Kassim, Robinson cross-examined Kassim concerning the McInnis trial and Robinson's prior representation of Kassim (Pet. App. 8a-10a). In the course of Robinson's cross-examination, Kassim accused Robinson of vouching for a purchase of false prescriptions (31 Tr. 17-20, 23), of suborning perjury (31 Tr. 21, 49, 54-56, 68-69, 79-80; Pet. App. 9a), and of participating in an illegal drug sale related to the conspiracy charges in this case (31 Tr. 67, 77-78, 82-88; Pet. App. 9a-10a).

Robinson referred in closing argument to Kassim's accusations against him (Pet. App. 10a). Robinson used Kassim's accusations in his effort to discredit her, by arguing that her accusations against petitioner were as baseless

as her accusations against him.[2] Robinson concluded by arguing that if anyone "would ever take Nellie Bell's word to find a person guilty in a criminal case, then our population is naive indeed" (56 Tr. 117).

3. The jury convicted petitioner of conspiring to possess with intent to distribute four of the eight drugs alleged in the indictment. The court of appeals affirmed (Pet. App. 1a-23a). Declining to reach the issue whether Robinson's representation of petitioner was adversely affected by an actual conflict of interest, the court upheld his conviction on the ground that petitioner had made a voluntary, knowing, and intelligent waiver of his Sixth Amendment right to conflict-free counsel.

ARGUMENT

1. The court of appeals properly upheld the trial court's decision to accept petitioner's waiver of any right to conflict-free counsel. Contrary to petitioner's claims, the court of appeals did not hold that a defendant may voluntarily, knowingly, and intelligently waive his Sixth Amendment right to effective assistance of counsel "even if the defendant is wholly unaware of the underlying facts or attendant risks" of his counsel's actual or potential conflict of interest (Pet. 15; see also *id.* at i, 13-14). Consistent with this Court's decisions, the court of appeals concluded that petitioner's waiver was effective only after the court determined that in light of " 'the particular facts and circumstances surrounding th[e] case including the background, experience, and conduct of the accused,' " the waiver was made " 'knowing[ly] and intelligent[ly]' "

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[2] See Pet. App. 10a (" 'And if you do take her word not only does [petitioner] have trouble but some day I might too.' "); 56 Tr. 115 ("If you believe that about me, then that is too bad for me and too bad for [petitioner].").

(Pet. App. 13a, quoting *Edwards* v. *Arizona,* 451 U.S. 477, 482 (1981), quoting *Johnson* v. *Zerbst,* 304 U.S. 458, 468 (1938)). The court upheld the waiver because it was made with " 'sufficient awareness of the relevant circumstances and likely consequences' " (Pet. App. 11a (quoting *Brady* v. *United States,* 397 U.S. 742, 748 (1969)); see Pet. App. 12a-14a).

The circumstances of this case fully support the court of appeals' conclusion that petitioner's waiver was made knowingly and intelligently. First, petitioner was plainly aware of the facts underlying and risks associated with the possibility that his attorney might have divided loyalties. Petitioner filed an affidavit with the district court in which he expressly waived "any conceivable—actual or potential—conflict" stemming from Robinson's prior representation of Kassim and his prior defense of McInnis on related drug charges (Pet. App. 4a, 12a). Petitioner subsequently attended a pretrial hearing on the conflict of interest issue (*id.* at 4a-6a). There, the government explained the risks associated with retaining defense counsel with divided loyalties (in the analogous context of multiple representation), particularly the possibility of less than vigorous cross-examination (*id.* at 4a). The court in turn inquired whether petitioner had heard all that had been said and explained to petitioner the scope of his Sixth Amendment right to conflict-free counsel, the potential consequences of conviction, and the legal significance of petitioner's waiver (*id.* at 4a-6a).

Furthermore, as the court of appeals found (Pet. App. 13a-14a), petitioner was specifically made aware that Robinson might also have divided loyalties due to accusations Kassim might make against him at trial. Prior to the trial, the government produced Jencks Act material that notified the parties that Kassim had agreed to be a government witness and had made allegations against Robinson (*id.* at 6a-8a). At a subsequent pretrial hearing on a

severance motion filed by a co-defendant, Robinson informed the court in petitioner's presence that petitioner was aware that Kassim might make serious criminal accusations against Robinson and that petitioner was nonetheless willing to waive his Sixth Amendment rights and retain Robinson as counsel (*id.* at 7a, 12a-13a). Petitioner remained silent and did not in any way alter, qualify, or repudiate his waiver (*id.* at 13a). As the court of appeals found, petitioner, who graduated from both Stanford University and the University of Texas Medical School, and who was completing his residency in internal medicine at the University of Michigan when he was indicted, "possessed sufficient intelligence * * * to understand the significance of Robinson's representation to the court that, even though Kassim [might] make accusations against [Robinson, petitioner] stood by his waiver" (*ibid.* (footnote omitted)).[3]

Petitioner is wrong, therefore, in claiming that the court of appeals' decision rested on the broad proposition that "a prospective waiver of any 'conceivable' conflict is constitutionally sufficient, even if the defendant is wholly unaware of the underlying facts or attendant risks * * * so long as it can be established that the defendant 'possessed sufficient intelligence to comprehend the import of a waiver of "any conceivable conflict"' " (Pet. 15-16 (quoting Pet. App. 13a)). The court of appeals carefully considered a number of factors, especially that petitioner affirmed his unconditional written waiver after being informed about the risks of representation by a counsel with

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[3] Petitioner's current suggestion (Pet. 22) that he remained silent because he mistakenly believed that his earlier waiver precluded him from raising the issue is wholly unpersuasive. The plain import of Robinson's remarks to the court in petitioner's presence was that the issue could be, and had been, reopened.

divided loyalties and that petitioner did not repudiate that waiver at a subsequent hearing after learning that Kassim might accuse Robinson of wrongdoing.[4]

2. For the same reason, contrary to petitioner's claim (Pet. 14, 17-20), the court of appeals' decision does not conflict with the decisions of other courts of appeals in *United States* v. *White*, 706 F.2d 506 (5th Cir. 1983); *United States* v. *Curcio*, 680 F.2d 881 (2d Cir. 1982); and *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978). Consistent with the discussion of Sixth Amendment waivers in those cases, the court below carefully considered the circumstances of this case and concluded that petitioner's awareness was sufficient to support his waiver. Decisions regarding the validity of a waiver are inherently fact-specific, and the fact that other courts have reached different conclusions as to the validity of a waiver on the facts before them does not create a conflict with a case upholding a waiver on different facts.

The three cases upon which petitioner relies in asserting a conflict among the circuits addressed distinct legal matters or involved materially different factual circumstances.

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[4] Petitioner makes much of the bitter exchanges between Kassim and Robinson at trial and of Robinson's repeated references to Kassim's accusations against him in Robinson's opening and closing arguments. Those statements at trial do not, however, bear on the validity of petitioner's pretrial waiver, which depends on the defendant's awareness of the relevant circumstances and risks at the time of the waiver and not the precise manner in which those risks are later realized (or not realized) at trial. As petitioner acknowledges (Pet. 25), once a valid waiver is made, a defendant "cannot thereafter be heard to complain." In any event, it is plain that those exchanges and statements were the products of Robinson's deliberate attempt at trial to discredit Kassim's testimony against petitioner by attacking the credibility of the similar accusations against Robinson. See Pet. App. 10a, 14a. Petitioner may now be dissatisfied with the result of that trial strategy, but having knowingly agreed to it, he cannot now repudiate it.

In *Dolan* and *Curcio*, both of which involved conflicts of interest stemming from joint representation, the courts of appeals were addressing the distinct question—not raised in this case—whether a district court erred in *not* accepting a defendant's proffered waiver of his Sixth Amendment right to conflict-free counsel. In *Dolan*, the Third Circuit held that a trial judge was not required to accept a defendant's waiver when there was an actual conflict of interest (570 F.2d at 1184). The court never answered the question whether the waiver in that case had been made "knowingly and intelligently" (*ibid.*). In *Curcio*, the Second Circuit ruled only that the trial court erred in refusing to accept the defendant's waiver without providing the defendant the opportunity to cure its defects (680 F.2d at 889-890). The court of appeals suggested, in particular, that providing the defendant with more time to consider the potential conflicts would have cured the problem (*id.* at 889). The Second Circuit did not, as petitioner requested the court of appeals to do in this case, overturn a trial court's finding that a defendant's Sixth Amendment waiver was valid (*id.* at 886; see Pet. 20 n.18).

The court of appeals' decision in the case also does not conflict with the Fifth Circuit's ruling in *White*. To be sure, the Fifth Circuit's decision in *White*, like this case, concerned the validity of a waiver by a defendant whose attorney was accused of criminal activities, and the Fifth Circuit, unlike the court in this case, overturned the trial court's approval of the waiver (706 F.2d at 508-510). The circumstances of the *White* case, however, differ materially from those of this case and account for the different outcome.

First, in concluding in *White* that the defendant lacked the requisite awareness of the underlying facts and the possible consequences of the conflict, the Fifth Circuit stressed (706 F.2d at 509 & n.5) that the defense attorney suffered from an actual, not merely potential, conflict at

the time because he was subject to a formal criminal investigation by the government. Indeed, the attorney was subsequently indicted, convicted, and imprisoned (see *id.* at 507-508 n.1). In this case, Robinson's conflict, if any, was only a potential conflict. The accusations of wrongdoing originated not from the government, but from a witness, whose credibility the government also questioned (see Pet. App. 10a n.2, 18a). Petitioner's characterization of Robinson as a target of prosecution is, as the court of appeals found (*id.* at 10a n.2), an exaggeration.

Furthermore, in this case, unlike in *White* (706 F.2d at 508, 509), the court did not have to rely solely on defense counsel's assurances that he had explained both the facts underlying the conflict and the possible consequences of divided loyalty to the defendant. In this case, the government described the risks associated with divided loyalties, albeit in the context of multiple representation, at the pretrial hearing on conflicts of interest. In addition, Robinson did not merely advise the court that he had explained to petitioner the possibility of a conflict stemming from the allegations against Robinson. Instead, Robinson described in open court and in petitioner's presence, the possibility that Kassim would accuse him of criminal wrongdoing at trial.[5]

3. Finally, petitioner argues (Pet. 25-28) that his Sixth Amendment rights were violated because the government "conceal[ed]" information about Robinson's conflicts and,

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[5] We also note that petitioner was present when the government brought to the court's attention during the June 24th hearing the conflict of interest under which another attorney in the case was laboring due to his status as a target of the criminal investigation. The government explained that in such circumstances the attorney had a personal interest in the outcome of the proceedings and a personal interest in what his clients might say about the investigation or their knowledge of the facts. The trial court disqualified the attorney. See Pet. App. 6a; 1 Tr. 33-49.

as a result, deprived the trial court of a full opportunity to explore the possibility of a conflict. That claim is unavailing.

Petitioner disputes (Pet. 9-10; Pet. App. 17a, 18a) the government's contention that Kassim did not make her accusations until August, rather than in July, and that, even then, the government did not take the accusations seriously. Regardless of these points of disagreement, there is no question that on September 8, 1986 (a few weeks after Kassim agreed to plead guilty), the government released Jencks Act material to the parties that revealed the possibility that Kassim might accuse Robinson of wrongdoing in connection with the criminal offenses charged in the indictment. Moreover, the Jencks Act material prompted a co-defendant to file a severance motion and Robinson to make his remarks concerning the possibility that Kassim would make accusations against him. Consequently, although the trial court may not have been aware of the additional grounds for possible conflict at the earliest moment, the court was made aware of the problem in advance of trial, and in time for the court to address it. Indeed, petitioner made this very point in his opening brief in the court of appeals.[6]

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[6] See Appellant's Br. 58 ("It is equally apparent that the 'real possibility of conflict' was explicitly brought home to the court before trial and re-emphasized throughout the proceedings. Based upon the severance motion of [co-defendant's] counsel and Mr. Robinson's own statements, the court was aware before the jury was sworn that Mr. Robinson might well be implicated in the events for which his client was charged, and that he was, in any case, a potential witness."); see also Pet. App. 12a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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